

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Patrick Ciliberto,

Complainant,

vs.

**ORDER DENYING PETITION  
FOR RECONSIDERATION**

James Terwedo,

Respondent.

On August 18, 2014, this matter came on for a probable cause hearing before Administrative Law Judge Eric L. Lipman to consider a complaint filed by Patrick Ciliberto. The complaint alleged that James Terwedo violated Minn. Stat. § 211B.06 by disseminating false campaign material.

By Order dated August 21, 2014, Administrative Law Judge Eric Lipman dismissed the complaint for lack of probable cause.

On August 25, 2014, Mr. Ciliberto submitted a petition for reconsideration of Judge Lipman's decision. On August 27, 2014, Mr. Terwedo submitted a response to the petition for reconsideration.


Patrick Ciliberto (Complainant) appeared in these proceedings on his own behalf. James Terwedo (Respondent) appeared at the probable cause hearing on his own behalf. David Asp, Lockridge, Grindal Nauen, PLLP, represented the Respondent with respect to the reconsideration petition.

Based on the record herein, and for the reasons stated in the following Memorandum the Chief Administrative Law Judge makes the following:

**ORDER**

The Complainant's Petition for Reconsideration is DENIED.

Dated: August 28, 2014

  
\_\_\_\_\_  
TAMMY L. POST  
Chief Administrative Law Judge

## NOTICE

Under Minn. Stat. § 211B.36, subd. 5, this Order is the final decision in this matter and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

## MEMORANDUM

### Complaint and Procedural Background

Ronald Hocevar and James Terwedo are both seeking election to the office of Scott County Attorney in the November 4, 2014, general election. The Complainant, Mr. Ciliberto, is the incumbent Scott County Attorney and is not seeking re-election to that post. Mr. Hocevar is the Chief Deputy Scott County Attorney.<sup>1</sup>

In July of 2014, as part of his campaign to become the Scott County Attorney, Mr. Terwedo circulated campaign material that asserted that his "opponent, who with his boss, benefitted when the previous county attorney sued Scott County residents for a wage increase."<sup>2</sup> The lawsuit referenced in the statement was the salary appeal filed by Mr. Ciliberto in 2011 entitled *Ciliberto v. Scott County Board of Commissioners*.<sup>3</sup>

On August 11, 2014, Mr. Ciliberto filed a complaint under the Fair Campaign Practices Act alleging that the identified statement was factually false and that Mr. Terwedo violated Minn. Stat. § 211B.06 by preparing and disseminating false campaign material.<sup>4</sup>

Mr. Ciliberto maintained that the Terwedo brochure was false in three respects: (1) Mr. Ciliberto, and not "the previous county attorney," filed the salary appeal in *Ciliberto v. Scott County Board of Commissioners*; (2) the salary appeal named the Scott County Board of Commissioners, and not "Scott County residents," as the respondents in the case; and (3) Mr. Hocevar did not benefit from the outcome of the appeal. Moreover, Mr. Ciliberto asserts that Mr. Terwedo was reckless when he made contrary claims in his brochure.

On August 21, 2014, Administrative Law Judge Eric Lipman issued an Order dismissing the complaint for lack of probable cause.<sup>5</sup> Judge Lipman found that the first claim was not actionable because the erroneous reference to "the previous county

---

<sup>1</sup> *Ciliberto v. Terwedo*, OAH 8-0325-31770, COMPLAINT, p. 2, and Attachment 2.

<sup>2</sup> *Id.*, at Attachment 1.

<sup>3</sup> *Id.*, referencing, at Attachment 2, *In the Matter of the Appeal of the Scott County Attorney's 2011 Salary and Budget*, (Scott County District Court Case No. 70-CV-10-31056), FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT. The appeal was filed pursuant to Minn. Stat. § 388.16, subd. 6.

<sup>4</sup> *Id.*

<sup>5</sup> *Ciliberto v. Terwedo*, OAH 8-0325-31770, ORDER OF DISMISSAL (August 21, 2014).

attorney” was not a statement concerning “the personal or political character or acts of a candidate.”<sup>6</sup>

Judge Lipman found that the second claim also failed because the reference to “Scott County residents,” while not literally true, was substantially accurate and rendered the “gist” or “sting” of the statement true.<sup>7</sup>

Finally, Judge Lipman found Complainant’s third claim failed to support a violation of Section 211B.06 because the statement that Mr. Hocevar “benefitted” from the salary appeal was an inference, which even if unfair or uncharitable, is not prohibited under the statute.<sup>8</sup> In reaching this determination, Judge Lipman noted the Respondent’s argument that, while Mr. Hocevar did not receive more wages as a result of Mr. Ciliberto’s salary appeal, the court victory conferred on him a better bargaining position for a wage increase in the future. Judge Lipman determined that, while the ordinary reader would not read the word “benefitted” as broadly as the Respondent intends, the statute prohibits only false statements of specific facts and not unfair inferences or criticisms.<sup>9</sup>

On August 25, 2014, the Mr. Ciliberto requested reconsideration of Judge Lipman’s Dismissal Order.

### **Reconsideration Analysis**

Pursuant to Minn. Stat. § 211B.34, subd. 3(b), the Chief Administrative Law Judge must review a petition for reconsideration within three business days and determine whether the assigned administrative law judge made a “clear error of law.”

#### **Complainant’s Argument**

The Complainant argues that Administrative Law Judge Eric Lipman made a clear error of law by deciding that there was no probable cause to believe that the Respondent violated Minn. Stat. § 211B.06 as alleged.

The Complainant asserts that the statement that Mr. Hocevar “benefitted” along with his boss from the salary appeal is an actionable false statement of fact and not an inference or opinion. The Complainant asserts that the Administrative Law Judge should have employed the “four factor test” used by the Minnesota Court of Appeals in *Fine v. Bernstein*<sup>10</sup> to distinguish a “protected statement of opinion from an actionable statement of fact.”<sup>11</sup> Under that test, tribunals must consider: (1) a statement’s precision

<sup>6</sup> *Id.*, at 6, citing Minn. Stat. § 211B.06.

<sup>7</sup> *Id.*, citing *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. 1986) (A statement is substantially accurate if its “gist” or “sting” is true).

<sup>8</sup> *Id.*, at 7, citing *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981).

<sup>9</sup> *Id.*

<sup>10</sup> 726 N.W.2d 137, 144 (Minn. Ct. App. 2007).

<sup>11</sup> *Id.*

and specificity; (2) a statement's verifiability; (3) the social and literary context in which the statement was made; and (4) a statement's public context."<sup>12</sup>

The Complainant maintains that the statement that Mr. Hocevar "benefitted when the . . . county attorney sued Scott County residents for a wage increase" is precise and easy to verify. Because the District Court declined to make any adjustment in favor of Mr. Hocevar during the 2011 salary appeal, the Complainant argues the statement that Mr. Hocevar "benefitted" is verifiably and factually false and was made in the context of an election. The Complainant asserts that the statement is an actionable false statement and not an opinion, and his claim that the statement violated Minn. Stat. § 211B.06 should proceed to a hearing.

The Complainant further maintains that the statement that the "previous county attorney" sued "Scott County residents" is an actionable false statement of fact and not simply an unfair inference outside the purview of Section 211B.06. The Complainant asserts that the sentence is false because he did not sue Scott County residents. His salary appeal, *Ciliberto v. Scott County Board of Commissioners*, named the County Board as the respondents. The Complainant asserts that under the same four-part test used in *Fine*,<sup>13</sup> the statement should be found to be a specific and verifiably false factual statement and not an inference.

Finally, the Complainant argues that the Administrative Law Judge made a clear error of law by finding that § 211B.06 "does not employ an ordinary reader test."<sup>14</sup> The Complainant maintains that the Minnesota Court of Appeals did employ a "reasonable person" or "ordinary reader" test in *Fine v. Bernstein* when distinguishing factual statements from expressions of opinion.<sup>15</sup>

### Statutory Analysis

Minn. Stat. § 211B.06 prohibits a person from intentionally participating in the preparation or dissemination of campaign material with respect to the personal or political character or acts of a candidate that is false and which the person knows is false or communicates to others with reckless disregard of whether it is false.

As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of fact. It is not intended to prevent criticism of candidates for office or to prevent unfavorable deductions or inferences derived from a candidate's conduct.<sup>16</sup> Moreover, the burden of proving the falsity of a factual statement cannot be met by showing only that the statement is not literally true in every detail. If the statement is

---

<sup>12</sup> *Id.*, citing *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302-03 (8<sup>th</sup> Cir. 1986).

<sup>13</sup> *Id.*

<sup>14</sup> *Ciliberto v. Terwedo* OAH 8-0325-31770, ORDER OF DISMISSAL, at 7 (August 21, 2014).

<sup>15</sup> *Fine*, 726 N.W.2d at 144, citing *Jadwin*, 390 N.W.2d at 441 (expressions of opinion are generally not actionable if, in context, a reasonable reader would understand the statement is not factual).

<sup>16</sup> *Kennedy*, 304 N.W.2d 299 (Minn. 1981); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language); *Bank v. Egan*, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917).

true in substance, inaccuracies of expression or detail are immaterial.<sup>17</sup> Finally, expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand that the statement is not a representation of fact.<sup>18</sup>

In *Kennedy v. Voss*, an incumbent County Commissioner complained that his opponent disseminated literature that unfairly characterized his support for programs serving the elderly.<sup>19</sup> The challenger, citing the incumbent's vote against the entire county budget, which included funding for programs serving the elderly as well as many other appropriations, asserted that the incumbent "is not a supporter of programs for the elderly."<sup>20</sup> The incumbent maintained that there were other votes, not cited in the challenger's literature, which made his support of the referenced programs clear.

The Minnesota Supreme Court held that inferences based on fact did not come within the purview of the statute – even if the inferences were "extreme and illogical."<sup>21</sup> The Court pointed out that the public is protected from such extreme inferences by the campaign process itself – namely, the opportunity of other candidates to rebut the critiques during their own outreach to voters.<sup>22</sup>

Contrary to the Complainant's assertion, the Administrative Law Judge did not determine the statement that Mr. Hocevar "benefitted" from the lawsuit was an opinion. Rather, guided by *Kennedy*, he concluded that the statement was an inference based on fact, which, even if unfair or uncharitable, was not prohibited under Minn. Stat. § 211B.06. Judge Lipman noted that the statute prohibits only false statements of fact, not criticisms or incomplete, inferential characterizations of past events.<sup>23</sup>

If Judge Lipman had analyzed the case as one presenting a fact-versus-opinion issue, the first two prongs of the "four-part test" from *Fine* would have mandated the same result. The statement that Mr. Hocevar "benefitted" when the county attorney sued for a wage increase is not so precise and specific, nor sufficiently verifiable as to render it an actionable false statement. The fact that Mr. Hocevar did not receive a salary increase as a result of Mr. Ciliberto's appeal is not determinative of whether Mr. Hocevar received any benefit. Because the duties of the County Attorney and Chief Deputy are so similar, Mr. Ciliberto's court victory arguably conferred upon Mr. Hocevar the indirect benefit of a better bargaining position for a raise in the future.

---

<sup>17</sup> *Jadwin*, 390 N.W.2d at 441.

<sup>18</sup> *Id.*, citing *Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Publishing Assoc. v. Bresler*, 398 U.S. 6, 13-14 (1970). See also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. Ct. App. 1996).

<sup>19</sup> 304 N.W.2d at 300.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* ("The public is adequately protected from such extreme inferences by the campaign process itself. For example, in this case, respondent distributed two flyers rebutting appellant's remarks. The voters of Dakota County had every opportunity to judge for themselves what inferences could properly be drawn from the record of the candidates.")

<sup>23</sup> *Ciliberto v. Terwedo*, OAH 8-0325-31770, ORDER OF DISMISSAL at 7.

Judge Lipman's determination that this statement was a permissible inference and not actionable under Minn. Stat. § 211B.06 was not clearly erroneous as a matter of law.

Likewise, Judge Lipman's determination that the reference to suing "Scott County residents" was substantially accurate and not actionable under Minn. Stat. § 211B.06, is not clearly erroneous as a matter of law. Judge Lipman found "the difference between a suit against the residents of Scott County and a suit that names their elected agents on the County Board is a claim where the 'sting' of Mr. Terwedo's critique is true."<sup>24</sup> That is, the statement may not be literally true, but the critique is true in substance. The Chief Administrative Law Judge finds Judge Lipman did not commit clear error when he determined that the import of the sentence was substantially accurate and not within the purview of Section 211B.06

Judge Lipman correctly noted that the burden of proving the falsity of a factual statement cannot be met by showing only that the statement is not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial.<sup>25</sup> In this case, the statement that the previous county attorney (Mr. Ciliberto) sued Scott County residents for a wage increase is substantially true.

A finding of "clear error of law" is a significant burden that the Complainant has not overcome. Administrative Law Judge Lipman's conclusion that the Respondent's statements were substantially accurate or permissible inferences and not factually false within the meaning of Minn. Stat. § 211B.06 was not clearly in error.

The petition for reconsideration is denied.

**T.L.P.**

---

<sup>24</sup> *Id.*, at 6.

<sup>25</sup> *Jadwin*, 390 N.W.2d at 441.